Supreme Court, U.S.
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No. 95-

In the Supreme Court of the United States

OCTOBER TERM, 1995

VICTOR PORTILLO AND RANCHO SIERRA CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Civil Procedure 37 authorizes, and the Due Process Clause of the Fifth Amendment permits, a district court in a civil forfeiture action to order, as a discovery sanction, that a claim to millions of dollars worth of real property be stricken and a default judgment entered, because the claimant, who lives abroad, refuses to travel to the United States to be deposed, where the claimant offers to admit the truth of every allegation in the government's forfeiture complaint and wishes to contest only the purely legal issue whether the forfeiture imposed in the action is grossly excessive in violation of the Eighth Amendment.

RULE 14.1 STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

> Real property including any building, appurtenances, and improvements thereon located at Rialto Acres, *et al.*, defendants (for a complete list of the defendant properties, see App., *infra*, 4a-18a).

RULE 29.6 STATEMENT

Petitioner Rancho Sierra Corporation states that it has no parent or subsidiary corporations.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a-3a) is unreported. The orders of the United States District Court for the Central District of California (App., *infra*, 4a-17a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1996. A petition for a writ of certiorari is accordingly due on April 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law."

Rule 37 of the Federal Rules of Civil Procedure provides in pertinent part:

> **(b) Failure to Comply With Order.**
>
> * * *
>
> **(2) Sanctions by Court in Which Action is Pending.** If a party * * * fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > **(A)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> >
> > **(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
> >
> > **(C)** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> * * *
>
> **(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party * * * fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, * * * the court in which the action is pending on motion may make such orders in regard to the failure as

are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. * * *

STATEMENT

This case arises from two civil forfeiture actions commenced by the United States against certain real properties located in California, and owned by petitioner Victor Portillo and petitioner Rancho Sierra Corporation ("Rancho Sierra"). Rancho Sierra purchased the properties for approximately $2.6 million in 1990. Stripped to their essentials, the government's forfeiture complaints alleged that petitioners' properties were forfeitable under 18 U.S.C. § 981(a)(1)(A) because they were purchased with funds traceable to some $160,000 that had been involved in "structure" transactions that violated 31 U.S.C. § 5324(a).

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, the district court ordered petitioners' claims to the properties stricken and a default judgment entered in favor of the United States when Portillo failed to come to Los Angeles, California for a deposition in this case. In entering that order terminating these cases, the district court declined to rule on petitioners' pending motion for summary judgment in which petitioners admitted, *arguendo*, the truth of all of the facts alleged in the government's complaints and challenged only the size of the resulting forfeiture as grossly excessive under the Eighth Amendment to the United States Constitution. The Ninth Circuit affirmed.

A. Proceedings In The District Court

1. The first of these two consolidated actions was commenced on April 12, 1993, against real property located at Rialto Acres in Fontana, California. The property had been purchased in April 1990 by petitioner Rancho Sierra for $1.36 million. According to the government's complaint, Rancho Sierra purchased the property "in part" with $100,000 that was "traceable" to money that had been involved in "structuring transactions" in violation of 31 U.S.C. § 5324(a). ER 1-14.[1] The complaint did

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[1] Citations to "ER" refer to the Excerpt of Record filed by petitioners in the court of appeals.

not allege that the "structured" $100,000 portion of the purchase price was the proceeds of (or even traceable to the proceeds of) any criminal activity or that the Rialto Acres property itself was used for or otherwise a part of any criminal activity.

One month later on May 14, 1993, the government filed the second forfeiture action against another piece of property in Fontana owned by Rancho Sierra. This property, a vacant lot between Mango Street and Sierra Avenue, had been purchased in March 1990 by Rancho Sierra for $1.25 million. The complaint alleged that the property was purchased "in part with $59,180 in moneys traceable to other monies involved in structuring transactions" in violation of 31 U.S.C. § 5324(a). As with the Rialto Acres properties, the government did not allege that the "structured" $59,180 portion of the purchase price represented (or was traceable to) the proceeds of any criminal activity or that the Mango Street property was used for or otherwise a part of any criminal activity.[2]

The basis for the government's forfeiture claims in both cases was 18 U.S.C. § 981(a)(1)(A), which authorizes the forfeiture of "[a]ny property, real or personal, involved in a transaction * * * in violation of section * * * 5324 of title 31." Section 5324 of Title 31 makes it a crime for any person to "cause or attempt to cause a domestic financial institution to fail to file a report [of a transaction involving $10,000 or more]" "or the purpose of evading [that] reporting requirement[]."

Rancho Sierra and Portillo each filed a verified claim to the Rialto Acres property and an answer to the complaint seeking forfeiture of that property. App., *infra*, 5a-10a; ER 31-36, 37-50, 57-63. Rancho Sierra filed a verified claim to the Mango Street property and answered that complaint. App., *infra*, 5a; ER 31-32, 51-56.

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[2] The government filed a third forfeiture action on October 5, 1993, against real property in Fontana purchased by Portillo. That action, in which petitioner Portillo's claim was also struck under Rule 37 by the district court, was dismissed on appeal and is not a subject of this petition.

2. On December 3, 1993, the government noticed the deposition of Portillo, a resident of Mexico, for January 4, 1994, in the office of the United States Attorney in Los Angeles. The deposition was continued — on a motion for a protective order by Portillo — to March 1, 1994, to allow petitioner adequate time to prepare. SER 1-71, 439-444.[3] Portillo did not, however, appear at his deposition on March 1.

In response, the government moved to strike the claims and answers of both Portillo and Rancho Sierra. SER 445-546. Portillo opposed the government's motion, arguing that his "failure to appear for [his] deposition was not in bad faith, but an action taken out of a reasonable fear for his personal safety" caused by a former business associate involved with Rancho Sierra. Opp. at 3. Portillo moved for another protective order seeking to have his deposition taken in Mexico, either in person (in which case he would pay the government's expenses), telephonically, or in writing. *Ibid.*

On April 11, 1993, the district court denied Portillo's motion for a protective order. The court ordered Portillo to appear for his deposition at the office of the United States Attorney in Los Angeles within 30 days, and threatened to "toss the case" if he failed to do so. ER 107-109. Portillo requested another continuance on the ground that his mother was ill, and the district court continued his deposition until June 2, 1994. ER 114-116.

3. On May 10, 1994, petitioners simultaneously moved for summary judgment and for a protective order to prevent the taking of Portillo's deposition until after the summary judgment motion was decided. ER 120-177, SER 809-816. For purposes of their summary judgment motion, petitioners accepted as true all of the allegations in the government's complaints. Indeed, petitioners expressly "conceded that the undisputed facts render the properties forfeitable to the United States." Response to Opposition to Summary Judgment at 6. Petitioners argued, however, that the forfeiture of the entire value of the properties — worth far more than the amounts allegedly involved in the structured transactions

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[3] Citations to "SER" refer to the Supplemental Excerpt of Record filed by the government in the court of appeals.

— was an excessive punishment under the Eighth Amendment, citing this Court's decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993).

In opposing petitioners' summary judgment motion (see Gov't Statement of Genuine Issues (ER 210-215)), the government did not dispute that the amounts involved in the alleged structuring transactions represented but a tiny fraction of the total amounts used to purchase the defendant properties. Nor did the government deny that it was seeking forfeiture of real properties totaling in value more than $2.6 million, of which less than $160,000 represented monies claimed to be traceable to funds involved in structuring transactions.[4] And, as explained above, the government did not maintain that the monies involved in the structuring transactions were themselves illegally obtained or traceable to illegally obtained currency, or that the defendant real properties had been used for any illegal purpose. Indeed, the government took the position in response to interrogatories from petitioners that the source of the money "was irrelevant to the subject matter of the action." ER 144-145, 160.

In fact, in opposing summary judgment, the government never proffered any evidence of a disputed fact. Instead, capitalizing on Portillo's failure to attend the deposition, the government argued that the motion "w[ould] be moot" if the district court struck petitioners' claims as the government had requested as a sanction for Portillo's failure to appear. Plaintiff's Memorandum of Points and Authorities in Opposition to Claimants' Motion for Summary Judgment ("Opp.") at 5. The government also maintained that the motion was premature until the property had actually been forfeited. *Id.* at 6. Finally, making a *merits* argument, the government asserted that the forfeiture of the total amount of the structured funds *and* the (substantial) balance of the rest of the

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[4] The government sought forfeiture of the Rialto Acres property, purchased for $1.36 million, and alleged that only $100,000 (7.35%) of the purchase price for the property involved monies traceable to structured funds. As for the Mango Street property, which was purchased for $1.25 million, the government alleged that $59,180 (4.73%) of the purchase price involved monies traceable to structured funds. See page 4, *supra*.

value of the properties was not excessive. *Id.* at 7-18. The government argued that forfeiture of the full value of the properties was not excessive because the properties "had a 'substantial connection' to and close relationship with the underlying criminal activity, the structured money. The remaining equity was part and parcel of the offense; without it, there would have been no purchase of the defendant property." *Id.* at 12 (quoting *Austin*, 113 S. Ct. at 2813-2815 (Scalia, J. concurring in part and concurring in the judgment)).[5]

4. On the date set for the hearing on petitioners' summary judgment motion, May 31, 1994, the district court denied petitioners' motion for a protective order, ordered that petitioner Portillo appear for his deposition in Los Angeles on June 2, 1994, and continued the hearing on petitioners' summary judgment motion to June 20, 1994. SER 817.

Portillo did not appear for his deposition on June 2, 1994, claiming that he was "hospitalized with a problem with [his] prostate" and unable to travel to Los Angeles. SER 826. On the basis of Portillo's failure to attend his deposition, the government moved to strike both petitioners' claims and answers in the consolidated cases and requested entry of judgment. SER 818-831.

On June 14, 1994, the district court removed petitioners' summary judgment motion from the court's calendar. ER 286. One month later, the district court in two separate orders struck petitioners' claims to the property and entered default judgments in the government's favor because Portillo had failed to leave his residence in Mexico to come to Los Angeles for his deposition. App., *infra*, 4a-18a.

In so ruling, the district court made no findings of fact to justify its severe sanction. Indeed, the court's orders made no

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[5] Alternatively, the government proffered its own "multi-factor test" — purporting to measure the "exten[t]" of "the criminal activity involving the property," the "role" of the property in "the commission of the crime," and whether the property was "deliberately selected to secure a special advantage" — to assess whether the forfeiture was excessive. Opp. at 13. Applying its homespun "multi-factor test," the government argued that the entire forfeiture sought was not excessive. *Id.* at 13-15.

mention of Rule 37, did not distinguish between Rancho Sierra and Portillo, and contained no explanation why Rancho Sierra's claims should be struck based on Portillo's failure to appear at his deposition.

At bottom, the court refused to consider petitioners' legal claim that, even assuming that all of the facts alleged in the government's complaints were admitted as true, the forfeiture of the subject property was grossly excessive under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Petitioners appealed.

B. Proceedings In The Court Of Appeals

On January 18, 1996, the Ninth Circuit affirmed in an unpublished opinion. App., *infra*, 1a-3a. The panel explained that under circuit precedent, the district court was required, before taking the extraordinary step of entering a default judgment as a discovery sanction under Fed. R. Civ. P. 37, to consider five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy seeking disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Id.* at 3a (citing *Wanderer* v. *Johnston*, 910 F.2d 652, 656 (9th Cir. 1990)). Because the district court made no explicit findings regarding these factors, the Ninth Circuit "review[ed] the record independently to determine whether the sanction was an abuse of discretion." App., *infra*, 3a.

On the basis of that review, the court of appeals upheld the sanction. The court explained:

> The real party in interest, Victor Portillo, failed to appear for his deposition after it had been continued several times. Portillo never obtained a protective order, and the record on appeal makes it quite clear that he never intended to appear for a deposition.

App., *infra*, 3a. Under these circumstances, the court held, "[t]he requisite willfulness is apparent" and the district court did not err in "striking the answers and ordering the forfeiture." *Ibid.* "All of the *Wanderer* factors," the panel added, "with the exception of the fourth[,] weigh in favor of dismissal." *Ibid.*

In so ruling, the court rejected Portillo's argument that the district court should have considered his constitutional challenge to the size of the punishments exacted in these cases (a challenge that did not require any discovery since it was premised on an admission, *arguendo*, that all allegations of the governments' complaints were true). Brushing that argument aside, the court explained: "The government was entitled to determine the underlying facts in order to *make its case*, and, contrary to the implication in appellants' briefs, the government never agreed that the case would be decided on the basis of facts alleged in the forfeiture petition, or that discovery was unnecessary." App., *infra*, 3a (emphasis added).

REASONS FOR GRANTING THE PETITION

In an unbroken line of precedent, this Court has held that the harsh sanction of dismissal of a party's claim may be imposed for a discovery violation only where there is a close nexus between the offending conduct and the claim that is dismissed (or the issues raised by that claim). The rationale for this limitation is straightforward: the due process right to be heard is satisfied if, but only if, a refusal to produce evidence may be presumed to be an admission of a claim's or defense's lack of merit. See, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 351 (1909). But when that refusal (or other sanctionable misconduct in the discovery process) is unrelated to issues raised by a claim, it violates due process (and exceeds the authority granted by Rule 37) to strike a claim on the basis of that unrelated conduct.

The decision below plainly conflicts with this settled principle. Petitioners submitted a motion for summary judgment to the district court accepting as true each and every one of the complaint's factual allegations; petitioners requested only that the court resolve the purely legal issue of whether forfeiture of their entire interest in the properties at issue constituted an excessive fine in violation of the Eighth Amendment. See generally *Austin* v. *United States*, 113 S. Ct. 2801 (1993). Yet the court of appeals upheld the district court's decision to strike petitioners' summary judgment motion, dismiss their claim, and enter a default judgment

for the government simply because petitioner Portillo did not leave his residence in Mexico to attend a deposition in Los Angeles — even though his deposition plainly was irrelevant to the non-factual issues that were all that remained in the case. That decision violated petitioners' due process rights and exceeded the court's authority under Rule 37. It accordingly warrants further review; indeed it warrants summary reversal.

At a minimum, the petition should be held pending this Court's decision in *Degen* v. *United States*, No. 95-173, which has been fully briefed and is set for oral argument on April 22, 1996. In *Degen*, the Court will consider whether the "disentitlement" doctrine may be invoked in a civil forfeiture action to bar a property owner — who (like claimant Portillo) lives abroad but refuses to travel to this country to participate in person in pending litigation — from offering any defense against the confiscation of his property in a United States court. Among other things, the Court in *Degen* is likely to clarify whether inaction of this kind warrants the imposition of a punitive sanction of forfeiture or can be reconciled with this Court's decisions in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), and *Hovey* v. *Elliott*, 167 U.S. 409 (1897). Given the obvious overlap between those issues and the issues raised in this petition, at a minimum the Court should remand this case if the outcome in *Degen* calls into question the decision below.

I. THE DECISION BELOW CONFLICTS WITH THIS AND OTHER COURTS' RULE 37 DECISIONS

Although Rule 37 affords district courts great discretion in fashioning sanctions for discovery violations, that discretion is far from unlimited. Rule 37(b)(2) itself requires that any sanction be "just," and this Court long has insisted that Rule 37 "be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law * * * ." *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 209 (1958). The Court's decisions addressing the effect of the Due Process Clause on Rule 37 accordingly "establish that there are constitutional limitations upon the power of courts, *even in aid of their own valid processes*, to dismiss an action without affording a party the

opportunity for a hearing on the merits of his cause." *Ibid.* (emphasis added).

In the seminal decisions of *Hovey* v. *Elliott*, 167 U.S. 409 (1897), and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), the Court specified precisely where those constitutional limitations lie. In *Hovey*, the Court reviewed a state court order dismissing a claim after the claimant HAD refused to comply with the state court's command to deposit money into the court registry. The dismissal order, this Court held, violated the claimant's due process rights, because the lower court entered it solely to punish the claimant for his refusal to comply with the court's order. 167 U.S. at 413-414.

Hammond Packing, by contrast, found that the Due Process Clause did not forbid a dismissal sanction that was triggered by a party's refusal to comply with an order to provide witnesses and produce documents relevant to its defenses. The difference, the Court explained, lay in the relationship between the discovery withheld and the claim sought to be stricken. In *Hammond Packing*, the close relationship between those two things enabled the Court to view the failure to provide discovery as tantamount to an admission of facts sought to be discovered (212 U.S. at 351):

> The difference between mere punishment, as illustrated in *Hovey* v. *Elliott*, and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other.

Hammond Packing thus established the proposition that a litigant may not be denied all right to defend or pursue his claims simply as punishment for failure to comply with a court order. Rather, a court may render judgment as a discovery sanction only when the discovery sought is likely to shed light upon the claims at issue in the aspect of the litigation in which the sanction is

imposed. As this Court subsequently summarized its holdings in this area:

> Rule 37(b)(2) contains two standards—one general and one specific — that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule of *Hammond Packing*, *supra*, the former represents the general due process restrictions on the court's discretion.

Insurance Corp. of Ireland, Ltd. v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

Cases subsequent to *Hammond Packing* have strictly adhered to this rule, upholding the sanction of dismissal only where the party's failure to comply with a discovery order produced a presumption that the noncomplying party had no basis on which to defend or prosecute a particular claim. See, *e.g.*, *Insurance Corp. of Ireland*, 456 U.S. at 706 ("Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption"). See also C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 2283, at 611 (2d ed. 1994) ("a sanction that goes beyond the issues to which the discovery was addressed cannot be supported on the presumption rationale of *Hammond* and would seem to exceed constitutional limits").

In *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988), for example, the First Circuit addressed a situation similar to that present here. The government brought a forfeiture action against real property alleged to have been purchased with the proceeds of drug trafficking. Prior to the initiation of the action, the record owner of the property, Charles Fogarty, had left the jurisdiction, leaving behind only a power of attorney. After Fogarty's mother used that power of attorney to claim an interest in the property on Fogarty's behalf, the government noticed Fogarty's deposition. When Fogarty failed to appear for the deposition, the government successfully sought a Rule 37 sanction dismissing Fogarty's claim.

The First Circuit reversed. Finding, among other things, no basis for concluding that Fogarty's testimony was necessary for the

government to prove its case, the court held that Fogarty should not be denied the opportunity to challenge the legal inadequacy of the government's case simply because the government could not depose him on issues unrelated to his legal claims. This was particularly true because the district court had less drastic options at its disposal:

> [T]he court could have denied Fogarty [any advantage gained by withholding testimony] by means much less drastic than outright dismissal. It could have, for example, precluded Fogarty from using at trial any information he should have produced at that deposition, perhaps even allowing the government to prevail after a showing of probable cause.

Id. at 642. What the district court could not do, however, was to allow the government to rid itself of its burden of proving those parts of its case that did not rely on Fogarty's testimony simply because Fogarty did not provide testimony on other aspects of the case.

The Second Circuit's decision in *Fonseca* v. *Regan*, 734 F.2d 944 (2d Cir.), cert. denied, 469 U.S. 882 (1984), illustrates the same limitation on Rule 37 sanctions. There, the court of appeals set aside a Rule 37 order dismissing a claim for recovery of currency as a sanction for the claimant's refusal to respond to discovery requests. The court explained that the requested discovery sought evidence concerning the claimant's "ownership" of the currency, but not his right to "possess" the currency — which was the only issue material to his claim. Observing that of the sanctions available under Rule 37, "the most severe * * * are dismissal and judgment by default" (*id.* at 947), the court held that the trial court lacked authority to dismiss a claim for failure to provide discovery that was irrelevant to the merits of the actual claim.

More recently, the Third Circuit, applying the same principle, set aside a Rule 37 sanction dismissing a motion filed by the City of Philadelphia in a prisoners-rights case. *Harris* v. *City of Philadelphia*, 47 F.3d 1311 (1995). Although the court of appeals recognized (*id.* at 1331) that the City had failed to produce documents as ordered by the trial court, it concluded that the withheld documents had too "tenuous" a "nexus" to the issues

presented by the City's motion. *Ibid.* The court accordingly reversed the Rule 37 dismissal. See also *Dunbar* v. *United States*, 502 F.2d 506 (5th Cir. 1974) (setting aside Rule 37 dismissal where the underlying discovery order was not material to the dismissed claim).

These cases are in accord with those of other circuits that have read this Court's decisions both to forbid the dismissal of claims on which the unavailable discovery would shed no light, and to require district courts to examine alternative sanctions prior to imposing the draconian sanction of dismissal. See, *e.g.*, *Matter of MacMeekin*, 722 F.2d 32, 34-36 (3d Cir. 1983) (requiring consideration of less drastic remedies).[6] Indeed, the Third Circuit has concluded that entering judgment against a party is so extraordinary a sanction that it requires district courts entering Rule 37 dismissals to accompany such orders with "some articulation on the record of the court's resolution of the factual, legal and discretionary issues presented." *Quality Prefabrication, Inc.* v. *Daniel J. Keating Co.*, 675 F.2d 77, 81 (3d Cir. 1982). Orders arriving at the circuit court without such a written rationale face near certain reversal, particularly where they do not reflect an assessment of less severe remedies. See *Matter of MacMeekin*, 722 F.2d at 34-36.

The Ninth Circuit's decision stands in stark conflict with the cases just cited as well as with this Court's unbroken line of decisions since *Hammond Packing*. To begin with, the sanction of dismissal here simply was not "specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Insurance Corp. of Ireland*, 456 U.S. at 707. Indeed, in light of Portillo's explicit willingness to concede *all* factual issues alleged in the government's complaints (see Response to Opp. to Summary Judgment Motion at 6), it is difficult to find any claim at all to which his deposition was related. One thing, however, is clear: Portillo's deposition was not related to the claim he sought to

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[6] In fact, even the Ninth Circuit previously has recognized this rule (see *United States for the Use and Benefit of Wiltec Guam* v. *Kahaluu Const.*, 857 F.2d 600, 602-604 (9th Cir. 1988)), although it departed from that recognition in the decision below.

pursue in his summary judgment motion. All that Portillo sought to litigate there was the purely legal issue of whether forfeiting $2.6 million in property because $159,000 of the money used to purchase that property was traceable to money involved in an illegally structured transaction violated the Eighth Amendment's prohibition against the exaction of excessive fines. The government has never explained how, in light of his willingness to accept *every one* of the complaints' factual allegations, Portillo's deposition could have shed any light at all on that purely legal issue. Still less has the government explained how *Portillo's* conduct could possibly support the striking of *Rancho Sierra's* claims to real property worth millions of dollars.

The decision below also plainly conflicts with the requirement to examine alternatives to dismissal prior to entering that drastic sanction and to require district courts to articulate a reasoned basis justifying their choice of sanction. The district court's decision to preclude Portillo from litigating his entitlement to $2.6 million in property came to the Ninth Circuit with no explanation for the district court's actions, something the Ninth Circuit — in contrast to the Third Circuit — permits. Compare *United States for the Use and Benefit of Wiltec Guam* v. *Kahaluu Const.*, 857 F.2d 600, 603 (9th Cir. 1988) (district court need not make explicit findings regarding factors for determining sanctions), with *Matter of MacMeekin*, *supra* (district court must articulate basis for sanction of dismissal on record). And, perhaps even worse, although it is clear that an alternative like that ordered by the First Circuit in *Pole No. 3172, Hopkinton*, *supra*, would have preserved Portillo's due process rights without prejudicing the government's ability to pursue its case, there is no basis in the record for concluding that the district court ever considered such an alternative. The Ninth Circuit's decision to uphold the dismissal order on this record squarely conflicts with this Court's decisions and with a long line of circuit court decisions faithfully applying the *Hammond Packing* principle.

In light of the failure of the Ninth Circuit in this case to follow settled precedent from this Court, the Court may wish to consider a summary reversal of the decision below.

II. AT A MINIMUM, THE PETITION SHOULD BE HELD PENDING RESOLUTION OF *DEGEN* v. *UNITED STATES*, NO. 95-173

Even if the Court disagrees with our submission that summary reversal is warranted in this case, the petition should, at a minimum, be remanded if the outcome of *Degen* v. *United States*, No. 95-173, calls the correctness of the Ninth Circuit's decision into question. As explained above, *Degen* involves the use of the "disentitlement" doctrine to strike the claim of a property owner who (like petitioner Portillo) declines to travel to the United States from his residence abroad to participate personally in legal proceedings in this country. The Court in *Degen* is likely to illuminate whether such inaction on the part of a litigant could justify a multimillion dollar forfeiture sanction, as well as to clarify the requisite nexus between sanctionable conduct on the one hand and disruption to the sanctioning court's processes on the other. Moreover, the Court in *Degen* is faced with conflicting arguments about the meaning of this Court's decisions in *Hammond Packing Co.*, *Insurance Corp. of Ireland*, and *Hovey*, discussed above. Compare No. 95-173 Pet. Br. 24-27 and 95-172 Pet. Reply Br. 9-11, with No. 95-173 U.S. Br. 30-34. That issue is directly presented in this petition.

Apart from this overlap in issues, there is another reason why this case should be held for *Degen*. According to the government, Portillo's true reason for failing to attend his deposition in Los Angeles is the fear that, if he travels to the United States, he will be arrested and prosecuted. See Plaintiff's Reply to Claimants' Response to Plaintiff's Reply to Claimants' Opposition to Plaintiff's Motion to Strike Claims and Answers and to Enter Defaults at 6 ("[t]he evidence in this case clearly demonstrates that Portillo did not show up for his Court-ordered deposition because *he fears arrest* if he comes to the United States") (emphasis in original). By the same token, however, it is exceedingly difficult to see why the United States has persisted both in opposing Portillo's request for a protective order (and his various reasonable suggestions for alternatives to a deposition in this country, see page 5, *supra*), and in insisting that petitioners' claims be stricken and a default judgment ordered unless Portillo attends that deposition, unless the government's true aim is to pressure Portillo to come within its

criminal jurisdiction. Here, just as in *Degen*, the government appears to be using the ordinary processes of civil litigation not as a means of resolving the dispute at hand in an efficient manner, but rather to accomplish extraligitation goals of its own, perhaps in entirely separate cases.

Here, just as in *Degen*, the government's inappropriate use of discovery sanctions to accomplish extraligitation objectives raises grave concerns. As this Court is aware, civil forfeiture actions by their very nature give rise to special concerns because of the government's "direct pecuniary interest in the outcome." *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 502 & n.2 (1993); see also *id.* at 515 (Thomas, J., concurring in part and dissenting in part) (expressing "distrust of the Government's aggressive use of broad civil forfeiture statutes"). This Court should not permit the government to achieve *indirectly* through an unreasonable insistence on depositions being held in the United States (and on entry of default judgments when a claimant fails to travel here) what it cannot achieve *directly* through use of the disentitlement doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be summarily reversed, or at least remanded if appropriate in light of the Court's decision in *Degen*.

Respectfully submitted.

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APRIL 1996

APPENDICES

APPENDIX A
NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 94 56249
Plaintiff-Appellee,	)	
	)	D.C. No.
v.	)	CV-93-02103-RC(RS)
	)	
REAL PROPERTY RIALTO ACRES LOCATED IN FONTANA, CALIFORNIA, including any Buildings, Appurtenancs & Improvements thereon,	)	
	)	
Defendant,	)	
	)	
v.	)	
	)	
RANCHO SIERRA CORPORATION; VICTOR PORTILLO,	)	
	)	
Claimants-Appellants,	)	
	)	
v.	)	
	)	
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,	)	
	)	
Claimant-Appellee.	)	

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. REAL PROPERTY VACANT LAND, located between Mango Streets and Sierra Avenue in Fontana, California, Defendant, & RANCHO SIERRA CORPORATION, Claimant-Appellant.	No. 94-56261 DC No. CV-93-02810-RG(JM) MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, District Judge, Presiding
Argued and Submitted December 14, 1995
Pasadena, California
Filed January 18, 1996

Before: SCHROEDER, FERGUSON and O'SCANNLAIN, Circuit Judges.

This is an appeal from an order under Federal Rule of Civil Procedure 37 striking claimants' answers in three civil forfeiture proceedings and entering a default judgment against the properties. Before the district court entered a default

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

against claimants pursuant to rule 37, the court was required to consider the five factors delineated in *Wanderer* v. *Johnston*, 910 F.2d 652, 656 (9th Cir. 1990). The district court was also required to find that the party's behavior in ignoring the depositions demonstrated willfulness, bad faith, or fault. *Fjelstad* v. *American Honda Motor Co.*, 762 F.2d 1334, 1341 (9th Cir. 1985).

The five factors in *Wanderer* are: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy seeking disposition of cases on their merits; and (5) availability of less drastic sanctions. 910 F.2d at 656. The district court is not required to make explicit findings regarding these factors, but if it does not, as is the case here, this court reviews the record independently to determine whether the sanction was an abuse of discretion. *U.S. for the use and benefit of Wiltec Guam* v. *Kahaluu Const.*, 857 F.2d 600, 603 (9th Cir. 1988).

The real party in interest, Victor Portillo, failed to appear for his deposition after it had been continued several times. Portillo never obtained a protective order, and the record on appeal makes it quite clear that he never intended to appear for a deposition.

In those circumstances, the district court did not abuse its discretion in striking the answers and ordering the forfeiture. All of the *Wanderer* factors, with the exception of the fourth weigh in favor of dismissal. The requisite willfulness is apparent. The government was entitled to determine the underlying facts in order to make its case, and, contrary to the implication in appellants' briefs, the government never agreed that the case would be decided on the basis of the facts alleged in the forfeiture petition, or that discovery was unnecessary.

AFFIRMED.

APPENDIX B

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Attorneys For Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	No. CV 93-2810-RG(SX)
Plaintiff,	[~~Proposed~~] JUDGMENT
v.	
Vacant land located between Mango Street and Sierra Avenue Fontana, California,	
Defendant.	
RANCHO SIERRA CORPORATION,	
Claimant.	

This action rose out of a verified Complaint for Forfeiture. It appears that notice of this action has been given in the manner required by law, including to Rancho Sierra Corporation, titleholder, who filed a claim in this action. Therefore, the court deems that any other potential claimants admit the allegations of the Complaint to be true.

This cause came on for hearing on April 11, April 25, May 31, and June 20, 1994 for plaintiff's motion to strike the claim and answer of and to enter default judgments against claimant Rancho Sierra Corporation. After consideration of the record in this case, the pleadings filed in support of and in opposition to plaintiff's motion, and the arguments of counsel, it is:

1. ORDERED, ADJUDGED AND DECREED that the claim and answer of claimant Rancho Sierra Corporation in this action be and is hereby STRICKEN;

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiff and against Rancho Sierra Corporation;

3. The defendant, more particularly described as follows:

PARCEL NO. 1:

ALL OF THE NORTH HALF OF FARM LOT 502, ACCORDING TO MAP SHOWING SUBDIVISION OF LANDS BELONGING TO THE SEMI-TROPIC LAND AND WATER COMPANY, IN THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 11, PAGE 12, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY. SAVING AND EXCEPTING THEREFROM THE NORTH 164 FEET OF THE EAST 104 FEET MEASURED FROM THE WEST LINE OF MANGO OF THE EAST HALF OF THE NORTH HALF OF SAID LOT.

ALSO SAVINGS AND EXCEPTING THEREFROM THE NORTH 135 FEET OF THE WEST 190 FEET OF THE WEST 190 FEET OF THE WEST HALF OF THE NORTH OF SAID LOT. AREA SAID DISTANCES COMPUTED TO STREET CENTERS.

PARCEL NO. 2:

THE WEST HALF OF THE SOUTH HALF OF FARM LOT 495, ACCORDING TO MAP SHOWING SUBDIVISION OF LAND BELONGING TO THE SEMI-TROPIC LAND AND WATER COMPANY, IN THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 11, PAGE 12, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

EXCEPTING THEREFROM THE WEST 160 FEET OF THE SOUTH 165 FEET, MEASURED FROM THE EAST LINE OF SIERRA AVENUE.

ALSO EXCEPTING THEREFROM THE WEST 190 FEET OF THE NORTH 165 FEET OF THE SOUTH HALF OF THE FARM LOT 495, ACCORDING TO MAP SHOWING SUBDIVISION OF LAND BELONGING TO THE SEMI-TROPIC LAND AND WATER CO. AS PER MAP RECORDED IN BOOK 11, PAGE 12, OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

AREA AND DISTANCES COMPUTED TO STREET CENTERS.

EXCEPT THEREFROM THE WEST 50 FEET CONVEY TO OR DEDICATED TO THE COUNTY OF SAN BERNARDINO FOR SIERRA AVENUE

shall be condemned and forfeited to the United States of America and no other right, title or interest shall exist therein except as provided herein.

4. The aforesaid interests of all parties who have not filed a claim in this action, particularly Rancho Sierra Corporation, are forfeited to and vested in the United States of America.

5. The San Bernardino County Recorder shall index this judgment in the grantor index under the name of Rancho Sierra Corporation and in the grantee index in the name of United States of America.

6. Title to defendant real property having vested in plaintiff United States of America, the United States Marshal shall proceed forthwith to dispose of the property in accordance with the law.

7. That proceeds of the sale of defendant property, to the extent such amounts are available, shall be payable in the following priority:

(a) First, for payment to the United States Marshal Service of all expenses of forfeiture of the defendant including, but not limited to, expenses of seizure, custody, advertising and sale.

(b) Second, for payment to the San Bernardino County Assessor and Tax Collector (for real property taxes). The United States will pay all real property taxes accrued against the defendant property from the filing of the Complaint on May 14, 1993, to the date of the entry of Judgment in this matter. The United States shall not be liable for such taxes after the date of the entry of the Judgment in this matter.

(c) Third, for deposit in accordance with the law.

DATED: This 21 day of July, 1994.

/s/ RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/
ERIC HONIG
Assistant United States Attorney

APPENDIX C

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Attorneys For Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	No. CV 93-2103-RG(Sx)
Plaintiff,	[~~Proposed~~] JUDGMENT]
v.	
REAL PROPERTY, INCLUDING ANY BUILDINGS, APPURTENANCES AND IMPROVEMENTS THEREON located at Rialto Acres, Fontana, California,	
Defendant.	

RANCHO SIERRA CORPORATION, . ALFREDO PAEZ, VICTOR PORTILLO, and OASIS IRRIGATION AND SUPPLY, INC.,	)
Claimants.	)

This action rose out of a verified Complaint for Forfeiture. It appears that notice of this action has been given in the manner required by law, including to Rancho Sierra Corporation and Victor Portillo, titleholders, and to Oasis Irrigation and Supply, Inc., and Alfredo Paex, lienholders. Wherefore, the court deems that any other potential claimants admit the allegations of the Complaint to be true.

This cause came on for hearings on April 11, April 25, May 31, and June 20, 1994 for plaintiff's motion to strike the claims and answers of and to enter default judgments against claimants Victor Portillo and Rancho Sierra Corporation. After consideration of the records in these cases, the pleadings filed in support of and in opposition to plaintiff's motion, and the arguments of counsel, it is:

1. ORDERED, ADJUDGED AND DECREED that the claims and answers of claimants Victor Portillo and Rancho Sierra Corporation in this action be and are hereby STRICKEN;

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiff and against Victor Portillo and Rancho Sierra Corporation;

3. The defendant, described as follows:

PARCEL NO. 1:

THAT PORTION OF THE SOUTH 1/2 OF THE LOT 8, RIALTO ACRES, IN THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, RECORDED IN BOOK 18 OF MAPS, PAGE 12, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF THE SOUTH 1/2 OF SAID LOT 8; THENCE SOUTH LINE OF LOT 8, 343.20 FEET TO THE SOUTHWEST CORNER OF LAND CONVEYED TO RICHARD TOBIN, ET UX., BY DEED RECORDED MAY 16, 1946 IN BOOK 1890, PAGE 352, OFFICIAL RECORDS; THENCE NORTH ALONG THE WEST LINE OF SAID TOBIN LAND, 100 FEET TO THE NORTHWEST CORNER THEREOF; THENCE EAST ALONG THE NORTH LINE OF TOBIN LAND 317.55 FEET TO THE EAST LINE OF SAID LOT; THENCE NORTH ALONG SAID EAST LINE, 70.8 FEET OF THE SOUTHEAST CORNER OF LAND CONVEYED, TO JOHN FOSTER, A SINGLE MAN, BY DEED RECORDED MAY 8, 1952 IN BOOK 2946, PAGE 485, OF OFFICIAL RECORDS; THENCE WEST ALONG THE SOUTH LINE OF SAID FOSTER LAND 272.24 FEET TO THE SOUTHWEST CORNER THEREOF; THENCE NORTH ALONG THE WEST LINE OF SAID FOSTER LAND, 160 FEET TO THE NORTH LINE OF THE SOUTH 1/2 OF SAID LOT 8; THENCE WEST ALONG THE SAID NORTH LINE TO THE POINT OF BEGINNING.,

EXCEPT [SIC] THE MOST EASTERLY 272 FEET THEREOF, ALSO EXCEPTING THEREFROM THAT PORTION DESCRIBED IN THE DEED TO HAZEL HUNTER RECORDED OCTOBER 8, 1979 IN BOOK 9787, PAGE 632, OFFICIAL RECORDS.

PARCEL NO. 2:

THE EAST 272 FEET OF THE SOUTH 1/2 OF THE LOT 8 OF RIALTO ACRES, IN THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER PLAT RECORDED IN BOOK 18 OF MAPS, PAGE 12, RECORDS OF SAID COUNTY, COMPUTED TO THE CENTER OF MANGO AVENUE.

EXCEPT [SIC] THEREFROM THE SOUTH 100 FEET, ALSO EXCEPTING THEREFROM THE NORTH 160 FEET.

AREAS AND DISTANCES ARE COMPUTED TO ADJOINING STREET CENTERS.

PARCEL NO. 3:

THAT PORTION OF THE SOUTH 1/2 OF LOT 8, RIALTO ACRES, AS PER PLAT RECORDED IN BOOK 18 OF MAPS, PAGE 12, RECORDS OF SAID COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF THE SOUTH 1/2 OF SAID LOT; THENCE WEST 272.25 FEET; THENCE SOUTH 160 FEET; THENCE EAST 272.25 FEET; THENCE NORTH 160 FEET TO THE POINT OF BEGINNING.

AREAS AND DISTANCES ARE COMPUTED TO ADJOINING STREET CENTERS.

PARCEL NO. 4:

THAT PORTION OF THE SOUTH 1/2 OF LOT 8, RIALTO ACRES, AS PER PLAT RECORDED IN BOOK 18, OF MAPS, PAGE 12, RECORDS OF SAID COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF SAID LOT 8; THENCE NORTH 100 FEET; THENCE WEST 317.55 FEET; THENCE SOUTH 100 FEET; THENCE EAST 317.55 FEET TO THE POINT OF BEGINNING.

AREAS AND DISTANCES ARE COMPUTED TO ADJOINING STREET CENTERS.

PARCEL NO. 5:

THE SOUTH 127.40 FEET OF LOT 8, RIALTO ACRES, AS PER PLAT RECORDED IN BOOK 18, OF MAPS, PAGE 12, RECORDS OF SAID COUNTY.

EXCEPTING THEREFROM THE EAST 317.55 FEET.

PARCEL NO. 6:

THE NORTH 132 FEET OF THE WEST ACRES OF THE SOUTH 1/2 OF THE NORTH 1/2 OF THE NORTHEAST 1/2 OF THE SOUTHWEST 1/2 OF SECTION 32, TOWNSHIP 1 NORTH, RANGE 5 23ST, SAN BERNARDINO BASE AND MERIDIAN ACCORDING OF THE OFFICIAL PLAT OF SAID LAND.

EXCEPTING THEREFROM THE WESTERLY 30 FEET DEEDED TO THE COUNTY OF SAN BERNARDINO, BY DEED RECORDED NOVEMBER 21, 1894, IN BOOK 102, PAGE 406 OF DEEDS.

EXCEPTING THEREFROM ALL OIL, GAS AND HYDROCARBON SUBSTANCES IN AND UNDER SAID LAND, AS RESERVED IN DEED RECORDED JUNE 6, 1966 IN BOOK 6657, PAGE 472, OFFICIAL RECORDS.

Current Description

PARCEL NO. 0240131850000

RIALTO ACRES PIN S 1/2 LOT 8 BEG NW OR S 1/2 SD LOT 8 TH 8 ALG W LIL OF SD LOT TO SW COR THEREOF THE E ALG S LI OF SD LOT 343.20 FT TO SW OR OF LAND CONVEYED TO RICHARD TOBIN ET UX DEED RECORDED 5-16-46 BK 1890 PG 352 OR TH N ALG W LI OF SD TOBIN LAND 100 FT TO NW COR THEREOF TH 3 ALG N LI OF TOBIN LAND 317.55 FT TO E I OF SD LOT TH AN AGL E LI 70.8 FT TO SE COR OF LAND CONVEYED TO JOHN FOSTER DEED

RECORDED 5-8-52 BK 2946 PG 485 O R TH W ALG S LI OF SD FOSTER 272.25 FT TO SW COR THEREOF TH N ALG W LI OF FOSTER LAND 160 FT TO N LI OF S 1/2 OF SD LOT 8 TH W ALG SD N LI TO POB EX ELV 272 FT THEREOF AND EX THEREFROM THAT PTN DESC IN DEED TO HAZEL HUNTER RECORDED 10-8-79 BK 9787 PG 632 O R.

PARCEL NO. 0240131580000

RIALTO ACRES SUB E 272 FT S 1/2 LOT 8 MEAS TO C/L MANGO AVE EX S 100 FT THEREOF AND EX IN 160 FT .44 AC M/L

PARCEL NO. 0240131020000

RIALTO ACRES SUB PTN S 1/2 LOT 8 COM AT NE COR S 1/2 SD LOT TH W 272.25 FT TH S 160 ST TH E 272.25 FT TH N 160 FT TO POB .89 AC.

PARCEL NO. 0240131050000

RIALTO ACRES SUB S 100 FT E. 317.55 FT LOT 8.66 AC.

PARCEL NO. 0240131880000

RIALTO ACRES PIN S 1/2 LOT 8 COM AT A PT IN C/L O SIERRA AVENUE PIN S 1/2 LOT 8 COM AT A PT IN C/L OF SIERRA AVE 396.8 FT S OF NW COR OF SD LOT 7 TH S ALG SD C/L 137.40 FT TO NW COR OF LAND CONVEYED TO HORACE BROWN AND MARJORIE BROWN BY DEED REC 10-1-47 BK 2125 PG 593 O R TH E ALG IN LI.

///

///

PARCEL NO. 0240131880000

RIALTO ACRES PIN S 1/2 LOT 8 COM AT A PT IN C/L O SIERRA AVENUE PIN S 1/2 LOT 8 COM AT A PT IN C/L OF SIERRA AVENUE 396.8 FT S OF NW COR OF

SD LOT 7 TH S ALG SD C/L 137.40 FT TO NW COR OF LAND CONVEYED TO HORACE BROWN AND MAJORIE BROWN BY DEED REC 10-1-47 BK 2125 PG 593 O R TH E ALG N LI OF SD BROWN LAND 341.9 FT TO NE COR THEREOF SD PT BEING TH TRUE POB TH S ALG E LI OF SD BROWN LAND 127.40 FT TO S LI OF SD OT 7 TH E ALG S LI OF TH S ALG EL LI OF SD BROWN LAND 127.40 FT TO S LI OF SD LOT 7 THE ALGS LI OF LOTS 7 AND 8 662.29 FT TO SW COR OF LAND CONVEYED TO RICHARD TOBIN ET UX BY DEED REC 5-16-46 BK 1890 PG 352 O R TH N ALG W LI OF SD TOBIN LAND AND ITS DEED REC 5-16-46 BK 1890 PG 352 O R TH N ALGO W LI OF SD TOBIN LAND AND ITS NLY EXTENSION 127.40 FT TH W 662.29 FT TO TRUE PBO.

PARCEL NO. 2401611500000

N 132 FT W S AC S 1/2 N 1/2 NE 1/4 SW 1/4 SEC 32 TP IN R 5W MNL RTS RESERVATION OF RECORD 2 AC.

PARCEL NO. 0240372190000

SITUS ADDR: 17196 CERRITOS ST FONTANA 92336 TRACT 13411 LOT 1

PARCEL NO. 0240372200000

SITUS ADDR: 17186 CERRITOS ST FONTANA 92336 TRACT 13411 LOT 2

PARCEL NO. 0240372210000

SITUS ADDR: 17176 CERRITOS ST FONTANA 92336 TRACT: 13411 LOT 3

PARCEL NO. 0240372220000

SITUS ADDR: 17168 CERRITOS ST FONTANA 92336 TRACT 13411 LOT 4

PARCEL NO. 0240372230000

SITUS ADDR: 17158 CERRITOS ST FONTANA 92336 TRACT 13411 LOT 5

PARCEL NO. 0240372240000

SITUS ADDR: 17148 CERRITOS ST FONTANA 92336 TRACT 13411 LOT 6

PARCEL NO. 0240372250000

SITUS ADDR: 17140 CERRITOS ST FONTANA 92336 TRACT 13411 LOT 7

PARCEL NO. 0240372260000

SITUS ADDR: 17132 CERRITOS ST FONTANA 92335 TRACT 13411 LOT 8

PARCEL NO. 0240372270000

SITUS ADDR: 17124 CERRITOS ST FONTANA 92336 TRACT 13411 LOT 9

PARCEL NO. 0240372280000

SITUS ADDR: 17112 CERRITOS ST FONTANA 92336 TRACT 13411 LOT 10

PARCEL NO. 0240372290000

SITUS ADDR: 17104 CERRITOS ST FONTANA 92336 TRACT 13411 LOT 11

PARCEL NO. 024037230000

SITUS ADDR: NO SITUS ADDRESS FOUND TRACT 13411 LOT 0

shall be condemned and forfeited to the United States of America and no other right, title or interest shall exist therein except as provided herein.

4. The aforesaid interests of all parties who have not filed a claim in this action, particularly Victor Portillo and Rancho Sierra Corporation are forfeited to and vested in the United States of America.

5. The San Bernardino County Recorder shall index this judgment in the grantor index under the names of Victor Portillo and Rancho Sierra Corporation and in the grantee index in the name of United States of America.

6. Title to defendant real property having vested in plaintiff United States of America, the United States Marshal shall proceed forthwith to dispose of the property in accordance with the law.

7. That proceeds of the sale of defendant property, to the extent such amounts are available, shall be payable in the following priority:

(a) First, for payment to the United States Marshal Service of all expenses of forfeiture of the defendant including, but not limited to, expenses of seizure, custody, advertising and sale.

(b) Second, for payment to the San Bernardino County Assessor and Tax Collector (for real property taxes). The United States will pay all real property taxes accrued against the defendant property from the filing of the Complaint on April 12, 1993 to the date of the entry of Judgment in this matter. The United States shall not be liable for such taxes after the date of the entry of the Judgment in this matter.

(c) Third, for deposit in accordance with the law, but subject to the outcome of the outcoming claims of the remaining claimants.

DATED: This 21 Day of July 1994.

/s/ RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

PRESENTED BY:
NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/
ERIC HONIG
Assistant United States Attorney

Supreme Court, U.S.
FILED
JUN 21 1996
CLERK

No. 95-1693

In the Supreme Court of the United States

OCTOBER TERM, 1995

VICTOR PORTILLO AND RANCHO SIERRA CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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JOHN C. KEENEY
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18 pp

QUESTION PRESENTED

Whether the Due Process Clause and Fed. R. Civ. P. 37 permitted the district court to strike petitioners' answers and to enter default judgments in civil forfeiture proceedings against properties claimed by petitioners as a sanction for petitioners' repeated willful failure to comply with the discovery orders of the court.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1693

VICTOR PORTILLO AND RANCHO SIERRA CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 76 F.3d 390 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1996. Pet. App. 2a. The petition for a writ of certiorari was filed on April 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After petitioners' willful and repeated failures to comply with discovery orders in civil forfeiture proceedings in which petitioners appeared as claimants,

the United States District Court for the Central District of California, acting under Fed. R. Civ. P. 37, struck petitioners' answers to the forfeiture complaints and entered default judgments against the properties. The court of appeals affirmed. Pet. App. 2a-3a.

1. It has been a matter of public record since April 2, 1993, that the Federal Bureau of Investigation believes that petitioner Portillo has been involved in laundering drug proceeds. According to Henry Cleveland, formerly an "officer" in petitioner Rancho Sierra Corporation, Portillo was a drug trafficker who established Rancho Sierra for the purpose of laundering his drug money through the purchase of real estate. Portillo provided all the money to buy, subdivide, and develop the real estate and made all the decisions regarding which properties to purchase and how much to pay. Portillo, who resides in Mexico, has been aware since at least March 1993 that the FBI has been investigating him and he has avoided apprehension by law enforcement authorities. Gov't C.A. Br. 4-5.

On April 12, May 14, and October 5, 1993, the government filed civil forfeiture actions against certain real property located at Rialto Acres (Rialto), a vacant lot located between Mango Street and Sierra Avenue (Mango), and a residence located at 8946 Catawba Avenue (Catawba), all located in Fontana, California. The complaints, brought pursuant to 18 U.S.C. 981, alleged that the petitioners' properties were forfeitable because they constituted or were derived from proceeds of money laundering activity, in violation of 31 U.S.C. 5324 (structuring to evade cash transaction reporting requirements). The three complaints were consolidated. Petitioners Portillo

and Rancho Sierra filed claims to the properties and answers to the complaints. See Gov't C.A. Br. 1-2.

On December 3, 1993, the government in all three cases noticed the depositions of (1) Portillo, (2) the designated authorized representative of Rancho Sierra, and (3) the custodian of records for Rancho Sierra. The depositions were noticed for January 4, 1994. Petitioners moved for a protective order seeking a two-month postponement of the depositions to give them more time to prepare. The district court granted a continuance until March 4, 1994, a date later changed, at petitioners' request, to March 1, 1994. On March 1, 1994, Rancho Sierra's designated representative and records' custodian, attorney Marc Eagan, appeared and produced documents showing that Portillo was the sole shareholder and alter ego of Rancho Sierra. Portillo himself, however, failed to appear. His attorney stated on the deposition record that Portillo voluntarily chose not appear, that he was not ill, and that he had not been involved in any accident. See Gov't C.A. Br. 2, 5-6 & n.3.

On March 14, 1994, the government moved to strike the claims and answers of petitioners in all three cases because of Portillo's failure to appear for his deposition. Petitioners responded by moving for a protective order seeking to have Portillo's deposition taken in Mexico or telephonically; petitioners alleged that Portillo feared that his life would be threatened if he travelled to the United States.[1] The court

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[1] Portillo did not present any credible evidence of the basis of his alleged "fear." His motion referred in vague terms to an exhibit concerning firearms silencers; that exhibit, however, was not attached to his motion. The motion did attach an undated and unauthenticated transcript of a conversation in which cooperating witness Henry Cleveland purportedly

declined to enter default judgment at that time, and it denied petitioners' motion for a protective order. On April 11, 1994, the court ordered Portillo to appear for his deposition in Los Angeles, California within 30 days (*i.e.*, by May 11), and warned petitioners that Portillo's non-appearance would result in the entry of default judgment. Portillo then requested another delay, alleging that his mother was ill. On April 25, 1994, the district court granted Portillo additional time; it ordered that the deposition be held in Los Angeles on June 2, 1994. See Gov't C.A. Br. 2-3, 6-7.

On May 10, 1994, petitioners filed a motion for summary judgment, together with a new motion for a protective order to prevent the taking of Portillo's deposition until after the motion for summary judgment was decided. On May 31, 1994, the district court denied petitioners' new motion for a protective order, ordered that the deposition proceed on June 2 as previously ordered, and postponed the hearing on petitioners' summary judgment motion. On May 31, after the district court's adverse ruling, petitioners' counsel advised counsel for the government that Portillo had no intention of appearing for the June 2 deposition; as the sole basis for Portillo's refusal to attend, petitioners' counsel cited Portillo's fear that he might be arrested if he appeared. Portillo once again failed to appear for his deposition on June 2. For the first time, he alleged that his non-attendance was due to illness. Gov't C.A. Br. 7-8.

After the government advised the district court that Portillo had once again failed to appear at his

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described someone as a "jerk." The transcript did not in any way identify the person to whom Cleveland was referring. See Gov't C.A. Br. 7 n.4.

court-ordered deposition, the court took petitioners' summary judgment motion off the calendar. On July 21, 1994, the court issued orders striking each of petitioners' answers to the forfeiture complaints. On July 22, 1994, it entered judgment of forfeiture in the Mango case, and on July 25, 1994, it entered judgments of forfeiture in the Rialto and Catawba cases. Gov't C.A. Br. 8.

2. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 2a-3a. The court applied *Wanderer* v. *Johnston*, 910 F.2d 652 (9th Cir. 1990), which delineated five factors that must be considered before entering a default judgment as a sanction for noncompliance with discovery orders under Fed. R. Civ. P. 37. The five *Wanderer* factors are: (1) the public's interest in expeditious resolution of litigation, (2) the court's need to manage its docket, (3) the risk of prejudice to the party seeking sanctions, (4) the public policy seeking disposition of cases on their merits, and (5) the availability of less drastic sanctions. See Pet. App. 3a (citing *Wanderer*, 910 F.2d at 656). The court concluded that all the *Wanderer* factors, with the exception of the fourth (disposition of cases on their merits), weighed in favor of dismissal. Pet. App. 3a.

After an independent review of the record, the court of appeals also found that it was "quite clear" that Portillo "never intended to appear for a deposition." Pet. App. 3a. The court noted that "[t]he requisite willfulness is apparent," *ibid.*, and it rejected "the implication in [petitioners'] briefs" that "the government * * * agreed that the case would be decided on the basis of the facts alleged in the forfeiture petition, or that discovery was unnecessary." *Ibid.*

ARGUMENT

Petitioners contend that the entry of default judgments on the basis of discovery abuse contravenes the Due Process Clause of the Fifth Amendment and departs from the course of decisions applying Fed. R. Civ. P. 37 in the lower courts. Pet. 9-10. In the alternative, petitioners suggest that the petition should be held pending this Court's resolution of the due process claims raised in *Degen* v. *United States*, No. 95-173. See Pet. 10, 16-17. Because petitioners did not make any due process argument in the court of appeals, and the court of appeals did not address any due process issue, their constitutional claim is not properly before this Court. *Gray* v. *Netherland*, No. 95-6510 (June 20, 1996), slip op. 12; see also, *e.g.*, *Citizens Bank of Maryland* v. *Strumpf*, 116 S. Ct. 286, 290 n.** (1995); *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1605 n.5 (1994).[2] Moreover, since the filing of the petition this Court decided *Degen*; nothing in that decision casts any doubt on the legal analysis employed by the court of appeals. Finally, there is no conflict between the unpublished decision of the court of appeals in this case and the decisions of other courts of appeals. Accordingly, further review is not warranted.

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[2] For the same reason, petitioners' passing suggestion (Pet. 7-8) that it was error for the district court not to "distinguish between Rancho Sierra and Portillo" in imposing sanctions is not properly before this Court. The case was litigated in district court on the assumption that that court could properly treat Rancho Sierra as Portillo's alter ego. Petitioners' joint brief in the court of appeals did not contain any suggestion, much less a claim, that the district court erred in proceeding in that fashion.

1. In *Degen*, the Court held that federal courts may not invoke their "inherent authority" to "disentitle" a property owner from filing a claim and answer in a civil forfeiture proceeding on the ground that he is a "fugitive from justice" in a related criminal case. See *Degen* v. *United States*, No. 95-173 (June 10, 1996), slip op. 3-9. The judgments entered against petitioners were not based on any exercise of "inherent authority," on any theory that Portillo was a "fugitive from justice," or, as petitioners allege, on Portillo's mere "inaction" (Pet. 16) in declining to travel to the United States from a foreign country to litigate his claim in person. As permitted by Rule 37, those judgments were based instead on Portillo's repeated and willful noncompliance with the valid discovery orders of the district court.

Far from casting any doubt on the lower courts' application of Rule 37, *Degen* expressly reaffirmed the district court's traditional authority to sanction absent forfeiture claimants on the basis of discovery abuse in the civil forfeiture proceeding itself—including (slip op. 7) in "the discretion of the district court" the sanction of "dismissal in an appropriate case" (*ibid.*):

> [O]f course, Degen's absence entitles him to no advantage. If his unwillingness to appear in person results in non-compliance with a legitimate order of the court respecting pleading, discovery, the presentation of evidence, or other matters, he will be exposed to the same sanctions as any other uncooperative party. A federal court has at its disposal an array of means to enforce its orders, including dismissal in an appropriate case. Again, its powers include those furnished

> by federal rule, see, *e.g.*, Fed. Rules Civ. Proc. 37, 41(b); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam); *Societe Internationale pour Participations Industrielles et Commerciales* v. *Rogers*, 357 U.S. 197, 212 (1958); cf. *United States* v. *Pole No. 3172*, 852 F.2d 636, 641-642 (CA1 1988), and by inherent authority, see, *e.g.*, *Chambers* v. *NASCO, Inc.*, 501 U.S. [32,] 44-45 [(1991]; *Link* v. *Wabash R. Co.*, 370 U.S. [626,] 630-633 [(1962)]; *Woodson* v. *Surgitek, Inc.*, 57 F.3d 1406, 1416-1417 (CA5 1995); *Zebrowski* v. *Hanna*, 973 F.2d 1001, 1006 (CA1 1992) (Breyer, C.J.).

Ibid.

The entry of judgment in favor of the government was consistent with the precedents cited with approval by this Court. As required by *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), and *Societe Internationale Pour Participations Industrielles et Commerciales* v. *Rogers*, 357 U.S. 197 (1958), the court of appeals, after an independent review of the record, found that petitioner Portillo's failures to appear were willful. Indeed, "the record * * * makes it quite clear that he never intended to appear for a deposition." Pet. App. 3a. Petitioner Portillo was given multiple opportunities to appear in accordance with the court's order, and petitioners were warned that Portillo's non-attendance would result in the entry of default judgment. Portillo nonetheless willfully flouted the court's authority. He failed on two separate occasions to appear as ordered by the court, and he responded to the court's attempt to manage its docket in an orderly fashion with a pattern of transparently

pretextual excuses for his unavailability. In such circumstances, as this Court has made clear, "the most severe in the spectrum of sanctions * * * must be available to the district court * * *, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League*, 427 U.S. at 643.

To evade the consequences of willful non-compliance with discovery orders, petitioners filed a summary judgment motion claiming that the case could be resolved without discovery. The court of appeals held, however, that it had not been established that discovery was unnecessary. Moreover, it was plain from the record that the filing of that summary judgment motion was not a good faith response to the forfeiture complaint, but instead was another bad faith attempt to evade Portillo's duty to appear at the deposition. The summary judgment motion was not filed until petitioner Portillo had delayed, on grounds other than relevance, the initial deposition date and had unaccountably failed to appear, as ordered, at the March 1, 1994, deposition. The district court directed petitioner Portillo to appear on pain of the sanction of striking petitioners' pleadings, and granted him another postponement on grounds other than relevancy. It was only at that point, in an attempt to evade compliance with the district court's order, that petitioners filed a summary judgment motion that conceded, solely "[f]or purposes of [that] motion" (Pet. 5), the legal sufficiency of the government's threshold showing. In that context, the district court permissibly exercised its discretion to require Portillo's attendance at the deposition before consideration of his new motion. That procedural arrangement of the

proceedings was not an abuse of the court's discretion.

2. Petitioners also claim (Pet. 10-15) that imposition of the sanction in this case conflicts with the Rule 37 decisions of this Court and other courts of appeals. There is no conflict.

Petitioners argue that *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 351 (1909), establishes a proposition that "a court may render judgment as a discovery sanction only when the discovery sought is likely to shed light upon the claims at issue in the aspect of the litigation in which the sanction is imposed." Pet. 11-12. *Hammond Packing* involved the refusal of a party to comply with an order to provide witnesses and produce documents relevant to its defenses. In that context, the Court approved the sanction of dismissal on the theory that the refusal to produce evidence relevant to the defenses could be taken as "an admission of the want of merit in the asserted defense[s]." 212 U.S. at 351. A comparable nexus exists in this case, where the government sought discovery relevant to its own claim that petitioners' properties were forfeitable in their entirety and petitioner Portillo wilfully refused to comply with a valid discovery order. That act may be taken as an admission of facts that the government sought to discover in the deposition of petitioner, including complete substantiation for its claim to forfeiture of the entirety of the properties.

Contrary to petitioners' assertion (Pet. 12-13), the decision below does not conflict with the First Circuit's decision in *United States* v. *Pole No. 3172*, 852 F.2d 636 (1st Cir. 1988). That case disapproved of the sanction of dismissal for a party's failure to appear at his deposition where "[t]here [was] no

indication that he [was] still alive, let alone that he kn[ew] anything at all about this litigation." 852 F.2d at 641. For that reason, the First Circuit concluded that the record failed to support a finding of willfulness or bad faith by the defaulting party, as required by *National Hockey League*, *supra*, and *Societe Internationale*, *supra*. 852 F.2d at 641-642. Indeed, the First Circuit expressly distinguished (*id.* at 642) cases in which it is "clear that [a party] himself decided, after learning of his discovery obligations, not to appear."

There is no greater merit in petitioners' reliance (Pet. 13) on *Fonseca* v. *Regan*, 734 F.2d 944 (2d Cir.), cert. denied, 469 U.S. 882 (1984). In *Fonseca*, the Second Circuit concluded that the discovery orders at issue were not valid because the information was irrelevant to the legal issue presented in the case. 734 F.2d at 948-949. The court of appeals stated that "where the information sought is not properly discoverable, it is axiomatic that a district court should not impose a Rule 37 sanction for a party's failure to comply with an order to reveal such information." *Id.* at 948. Here, by contrast, the court of appeals agreed that the order to take Portillo's deposition was proper in the context of the legal issues presented in this case. It is true that petitioners chose, for tactical reasons, to concede "*arguendo*" (Pet. 3) the sufficiency of the government's complaint solely for purposes of their Eighth Amendment claim, but that contingent concession did not place the district court under any legal obligation to consider that claim immediately, much less did it render legally "irrelevant" to the proper disposition of the case the information sought by the government's discovery requests. That petitioners hoped that their contingent

concession would bring them victory without the need for further discovery did not obligate the government and the district court to proceed on the same assumption—and to conduct the litigation as if the only issues properly raised by the case as a whole were those pertinent to petitioners' Eighth Amendment motion.[3]

Nor are petitioners correct in asserting (Pet. 13-14) that the decision below conflicts with *Harris* v. *City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995). In that case, the Third Circuit held that documents that the City of Philadelphia had failed to produce did not have a sufficient connection with the merits of the pleading that was dismissed as a sanction for nonproduction. 47 F.3d at 1331. Moreover, since the dismissed pleading was the City's own motion to modify an extant injunction, the City could be

---

[3] Nor is it "clear," as petitioners assert, that no discovery would be required to resolve the supposedly "purely legal issues" of whether the forfeitures would violate the Eighth Amendment's prohibition against excessive fines. Pet. 14-15. Under Ninth Circuit law, that inquiry entails a "two-pronged approach": (i) an "instrumentality" or "nexus" test, and (ii) an examination of the relationship between "the value of the property" and the "culpability of the owner." *United States* v. *$69,292.00*, 62 F.3d 1161, 1166 (9th Cir. 1995); *United States* v. *Real Property Located in El Dorado County*, 59 F.3d 974, 982 (9th Cir. 1995). Thus, if the Eighth Amendment claim were to be litigated on the merits, the government would be entitled to probe the depth of petitioners' involvement in criminal activity, the full extent to which the subject properties were used in that activity, and issues such as "the intangible, subjective value of the property," and "the hardship" on the claimants. *El Dorado*, 59 F.3d at 985. The government would not be required to defend the Eighth Amendment claim solely on the allegations in its pleadings.

deprived of all benefit of its failure to produce the requested documents by delaying action on the motion to modify until the City complied with the discovery order. *Ibid.* That option did not exist in the instant case, where the delays caused by Portillo's willful discovery abuse worked to the government's prejudice. Cf. *Degen*, slip op. 6 (delay in forfeiture case "would be prejudicial to the Government, for if its forfeiture claims are good, its right to the properties is immediate"). Finally, in *Harris*, the Third Circuit recognized that a lesser relationship between the information being sought and the pleading dismissed as a sanction for nonproduction was appropriate where there was a "flagrant discovery violation" (47 F.3d at 1331), such as the failure to comply with discovery orders over an extended period, as occurred in *Curtis T. Bedwell & Sons, Inc.* v. *International Fidelity Ins. Co.*, 843 F.2d 683, 691-696 (3d Cir. 1988). Portillo's persistent disregard of the district court's orders for him to appear for the deposition in this case would clearly satisfy that Third Circuit's standard.

Finally, there is no conflict between the decision below and the cases petitioners cite (Pet. 14-15) requiring consideration of less drastic options before the sanction of dismissal may be imposed. The court below expressly recognized (Pet. App. 3a) "the availability of less drastic sanctions" as a factor it was required to consider, and, as petitioner recognizes (Pet. 14 n.6), the Ninth Circuit's published opinions require consideration of that factor as well. The court below simply concluded, in the face of Portillo's willful disobedience of the district court's discovery orders, that no sanction short of a default judgment would be sufficient in this case. There is no

warrant for Court to revisit that fact-bound conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1995

VICTOR PORTILLO AND RANCHO SIERRA CORPORATION, PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This Court's decisions make clear that, regardless of the reasons why a party violates a discovery order, "there are constitutional limitations upon the power of courts, *even in aid of their own valid processes*, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 209 (1958) (emphasis added). An unbroken line of this Court's cases interpreting Federal Rule of Civil Procedure 37 and the Due Process Clause of the Fifth Amendment to the U.S. Constitution thus forbids lower courts to impose the draconian sanction of dismissal "'as a mere punishment'" for a party's refusal to comply with a discovery order. See, *e.g.*, *id.* at 210, quoting *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 350 (1909). Instead, courts may bar a party from pursuing his claim as a result of a discovery violation only if there is a close nexus between the offending conduct and the claim that is dismissed (or the issues raised by that claim). See, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *Hammond Packing*, 212 U.S. at 351. The rationale for that limitation is straightforward: the due process right to be heard (which Rule 37 incorporates) is satisfied if, but only if, a refusal to produce evidence may be presumed to be an admission of a claim's or defense's lack of merit. Pet. 9.

That principle of due process and of Rule 37 was violated in this case when the district court ordered the outright dismissal of petitioners' claims to their property as a penalty for petitioner Portillo's failure to appear for a deposition, even though petitioners offered to admit every allegation of the government's complaint and sought merely to challenge the size of the forfeiture as grossly excessive under the Eighth Amendment. See *Austin* v. *United States*, 509 U.S. 602 (1993). In response to our petition, the government offers only a recasting of the precise arguments this Court rejected in the decisions cited above: that because petitioner Portillo refused to obey a discovery order, the district court was authorized to mete out any punishment, regardless of the relationship between the unavailable discovery and the issues remaining in the case. Because that argument is so plainly

incompatible with this Court's precedents, the Court should summarily reverse the decision below. In the alternative, the Court should grant plenary review or, at a minimum, grant the petition, vacate the decision below, and remand with instructions to the court of appeals to reconsider its decision in light of *Degen* v. *United States*, No. 95-173 (U.S. June 10, 1996), which casts further doubt upon the Ninth Circuit's analysis.

1. Far from supporting the decision below, as the government argues (Br. in Opp. 7-8), this Court's recent decision in *Degen*, which *unanimously reversed* a decision of the Ninth Circuit upholding the dismissal of a property owner's claim in a civil forfeiture action, in fact further confirms the Ninth Circuit's error in this case. According to the government, *Degen* "expressly reaffirmed the district court's traditional authority to sanction absent forfeiture claimants on the basis of discovery abuse in the civil forfeiture proceeding itself — including * * * the sanction of 'dismissal in an appropriate case.'" Br. in Opp. 7 (quoting *Degen*, slip op. 7). While we agree with the government that *Degen* is directly relevant to this case, we submit that the government misapprehends the import of the Court's decision in that case.

In *Degen*, this Court unanimously held that a district court may not, in the exercise of its inherent powers, sanction a property owner by dismissing his claim in a civil forfeiture action merely because he fails to return to the United States to face charges in a separate criminal action. That sanction, the Court explained, is "most severe," "excessive," and, in the end, simply "too rough." Slip op. 9. What is more, the Court expressly cautioned — in words that have direct applicability here — that "too free a recourse to rules foreclosing consideration of claims on the merits" would "erode[]" the very dignitary purposes justifying the imposition of sanctions in the first place. *Ibid*. Because the Court held that the "disentitlement doctrine" does not authorize a sanction in these circumstances, it had no occasion to decide whether such a sanction would violate due process. But the Court did take pains to acknowledge the fundamental "right of a citizen to defend his property against attack in a court" (slip op. 8), and its decision to limit the disentitlement doctrine plainly was animated by concerns over the due-process implications of a contrary holding.

The government is mistaken in suggesting that the Court's analysis demonstrates the correctness of the Ninth Circuit's decision in this case. On the contrary, this Court in *Degen* was careful to note that a federal court may impose the sanction of dismissal for violation of a discovery order, but only "*in an appropriate case*." Slip op. 7 (emphasis added). As the Solicitor General is well aware, that carefully chosen qualification reflects a lively debate during the oral argument of precisely the issue presented in this case — whether a district court may dismiss the claim of a property owner who resides abroad for failing to comply with a court order requiring that he travel to the United States for a deposition.

> Court: * * * I thought you were not contesting that as far as the forfeiture is concerned Mr. Degen would have to be treated like any other litigant, *so if he didn't show up, say, for a deposition,* didn't comply with all the discovery requirements, *out he goes*. * * *
>
> Counsel for Degen: Well, we are certainly not suggesting, Justice Ginsburg, that he has some special advantage by being — by virtue of his nonappearance, and so, for example, if there were an *appropriate* sanction for nonappearance in the forfeiture action, I suppose that *if that sanction otherwise comported with the two standards that this Court articulated in Insurance Corporation of Ireland*, I suppose he could be appropriately sanctioned * * *
>
> Court: But as to the forfeiture proceeding, he would have to comply with all the requirements the court would impose on anyone who's contesting a forfeiture.
>
> Counsel for Degen: That's absolutely correct, and the only point of departure that I thought I tried to suggest to Your Honor's question is — *insofar as the predicate is that if he didn't show up for a deposition he would be automatically subject to have his claim dismissed*, I'm not altogether sure that courts can dismiss claims whenever there's any particular violation of a discovery order.

No. 95-173 Oral Arg. Tr. 7-9 (emphasis added).[1]

This case squarely presents the question alluded to in the foregoing exchanges during the *Degen* oral argument: May a district court, consistent with Rule 37 and the Due Process Clause of the Fifth Amendment, impose the ultimate sanction of dismissal on a property owner even when the owner offers to admit every allegation in the government's complaint and seeks to litigate only a constitutional claim as to which discovery is unnecessary — here, whether the forfeiture sought by the government is excessive under the Eighth Amendment? Or, to use the language of *Degen*, is this an "appropriate case" (slip op. 7) in which the sanction of dismissal may be imposed, consistent with Rule 37 and due process?

The Court's opinion in *Degen* strongly suggests that it is not. As previously explained, the Court's opinion instructs that "too free a recourse to rules foreclosing consideration of claims on the merits" will "erode[]" the very dignitary purposes justifying the imposition of sanctions. Slip op. 9. In addition to urging caution in the use of the ultimate sanction of dismissal, the Court explained that "[c]onsideration of some of Degen's defenses, such as the statute of limitations, appears to require little discovery" and that if those defenses "have merit, the Government should not prevail." *Id.* at 8. In this case as well, petitioners' constitutional challenge to the magnitude of the forfeiture does not require factual development or discovery; and if he is correct about those claims, the government should not be permitted to extract a punishment that violates the Eighth Amendment. Finally, this Court's decision in *Degen* rests on the principle that dismissal is improper where there is no nexus between the offending conduct and claim that is dismissed. That principle is controlling here as well. Thus, *Degen* strongly supports our request for summary reversal.

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[1] See also *id.* at 12 (in response to question whether district court could exercise discretion to order absent claimant to appear for deposition, counsel for Degen noted that this would raise a "further question * * * as to whether the violation of that order gives — justifies the sanction, the dispositive sanction of dismissal").

In any event, this Court need not, at this juncture, resolve our disagreement with the Solicitor General over the proper interpretation of *Degen*. In view of the conceded relevance of *Degen*, this Court should, at the very least, follow its usual practice of granting the petition, vacating, and remanding to the Ninth Circuit for reconsideration in light of *Degen*.

2. The government also suggests (Br. in Opp. 6) that the failure of petitioners' papers below to expressly refer to "due process" precludes this Court from considering their constitutional arguments here. But petitioners plainly — and explicitly — grounded their brief to the Ninth Circuit in Rule 37, which, as this Court repeatedly has recognized, "itself embodies the standard established in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), for the due process limits on such rules." *Insurance Corp. of Ireland*, 456 U.S. at 705. See also *id.* at 707 (Rule 37(b)(2)'s requirement that any sanction be "just" represents "the general due process restrictions on the court's discretion"); *Societe Internationale*, 357 U.S. at 209 (Rule 37 must "be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law"); Fed. R. Civ. P. 37 advisory committee's note (1937) (noting that Rule 37's sanction provisions "are in accord" with the holdings of *Hammond Packing* and *Hovey* v. *Elliott*, 167 U.S. 409 (1897)).

Indeed, petitioners not only specifically premised their argument upon Rule 37 (see Pet. C.A. Br. 11), but they made the precise argument we advance here: that because Mr. Portillo's deposition would not shed any light on the issues remaining in the litigation, Rule 37 precluded the district court from dismissing petitioners' claims as a discovery sanction (see *id.* at 26 ("The deposition of Claimant Victor Portillo being irrelevant to any issue in dispute, the District Court should have held a hearing on the issue of whether ordering all of the defendant properties forfeited to the Government was an excessive penalty under the Eighth Amendment to the United States Constitution.")). Thus, although it is true that petitioners here have provided this Court with more citations and argument than they did below, the petition nevertheless addresses exactly the same issues that were briefed in the Ninth Circuit: whether Rule 37 — with its basis in due process

concerns — forbade the district court to do what it did. Petitioners did not waive any argument advanced by the petition.

3. When it comes to the question presented by our petition — whether the district court has the authority under Rule 37, consistent with the Due Process Clause, to impose the dismissal sanction on petitioners under the circumstances of this case — the government has nothing convincing to say. Not surprisingly, it does not *openly* dispute our basic claim that Rule 37 and the Due Process Clause prohibit district courts from imposing the sanction of dismissal for a discovery violation unless a close nexus exists between the offending conduct and the claim that is dismissed (or the issues raised by that claim). Its argument, however, nonetheless amounts to an outright denial of that settled principle. After all, petitioners willingly conceded *every factual allegation* raised in the government's complaint — the document that must provide the basis of any nexus the government claims exists here. See Br. in Opp. 10 ("the government sought discovery relevant to its own claim that petitioners' properties were forfeitable in their entirety and petitioner Portillo willfully refused to comply with a valid discovery order"). The government's argument thus boils down to a submission that the decision below was correct, not because Mr. Portillo's failure to appear for a deposition may serve as a proxy for his (and Rancho Sierra's) admission of disputed fact issues (there were no disputed fact issues), but rather merely to punish petitioners for Mr. Portillo's failure to be deposed. But, as this Court has emphasized again and again, that is simply not something courts may do. *See* Pet. 10-12 and cases cited therein.[2]

In its only concession to addressing the real issue before the Court, the government maintains in a footnote that had the district

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[2] The Solicitor General mistakenly states that the Ninth Circuit "held * * * that it had not been established that discovery was unnecessary." Br. in Opp. 9. In fact, the court of appeals merely observed that "contrary to the implication in appellants' briefs, *the government never agreed* that the case would be decided on the basis of the facts alleged in the forfeiture petition, or that discovery was unnecessary." Pet. App. 3a (emphasis added). We are aware of no rule of law — and the government cites to none — that entitles a party to take discovery on allegations whose truth the opposing party is willing to accept.

court considered petitioners' Eighth Amendment claims (which, at the government's request, it did not), the government would have sought to depose Mr. Portillo on issues related to those claims. See Br. in Opp. 12 n.3. That argument is misplaced for at least two reasons. Perhaps most importantly, the district court (*accepting the government's arguments below*) declined to consider petitioners' Eighth Amendment claim, not because it concluded that Mr. Portillo's failure to be deposed could be viewed as an admission of any factual allegations relevant to the Eighth Amendment claim — the district court refused to entertain any argument on the Eighth Amendment claim at all — but rather solely to punish him for not returning for a deposition that would have explored issues raised by the government's statutory forfeiture claim. See, *e.g.*, Pl. Mem. in Opp. to Claimant's Mot. for Sum. Judg. 5. Had the district court properly understood Rule 37's prohibition on such sanctions, it likely would have reached a different result.

But even if the district court had based its ruling on the government's theory here — that petitioners' assertion of their Eighth Amendment rights entitles the government to discovery on factual allegations not raised in any of the pleadings — the dismissal of petitioners' claims still would be wrong. That is because the government's theory rests on the mistaken assumption that the government, in defending against an Eighth Amendment challenge to a civil forfeiture of property based on a structured transaction, is entitled to probe all manner of "crimes" that are not mentioned in the complaint and that do not form the basis for the forfeiture complaint. The government cites no authority for that novel proposition, and we are aware of none. Indeed, the Ninth Circuit's leading case on applying the Eighth Amendment's excessiveness limitation to civil forfeiture actions strongly suggests (contrary to the government's unsubstantiated claim) that the "culpability" prong of its excessiveness test is limited to the claimants' culpability regarding the crime charged in the complaint. See *United States* v. *Real Property Located in El Dorado County*, 59 F.3d 974, 986 (9th Cir. 1995). Here, petitioners *offered to admit* to the only basis alleged in the forfeiture complaint for the forfeiture of property sought by the government — the structuring transactions. They sought only to challenge the

magnitude of the forfeitures as excessive in relation to the violations on which they were expressly based. Once the allegations of the government's complaint were admitted, there was no need for further discovery concerning "the culpability of the owner" or the "depth of petitioners' involvement in criminal activity" (Br. in Opp. 12 n.3).[3]

Finally, it bears repeating that the Eighth Amendment claim in this case is hardly insubstantial. The government sought to forfeit $2.6 million of petitioners' property because $159,000 of the money used to purchase that property was traceable to money involved in an illegally structured transaction. We submit that the excessiveness of a $2.6 million forfeiture in relation to these structuring offenses is a purely legal issue that should be resolved in petitioners' favor.

4. The government unsuccessfully seeks to explain away the various conflicts identified in our petition (at 12-15) between the opinion below and various decisions of other courts of appeals. See Br. in Opp. 10-14. To begin with, although the government correctly reports that *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988), relied in part upon the absence of a showing of willfulness in overturning a district court's dismissal of an absent party's claim in a forfeiture action, the First Circuit was clear in stating that the absence of willfulness was but one factor in its decision. The court's refusal to uphold a dismissal order also rested upon (1) the government's failure to point to any relevant facts it could have obtained from the claimant's deposition, and (2) the district court's ability to protect the government against any prejudice it would have suffered (if there had been facts that the claimant's deposition would have provided) simply by considering those facts resolved in the government's favor. *Id.* at 642-643. It is this aspect of *Pole No. 3172* that is incompatible with the Ninth Circuit's refusal here both to require the government to demonstrate that it suffered some prejudice from

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[3] In any event, it is worth emphasizing, even if factual allegations outside of the pleadings were relevant to the excessive fine issue, Portillo's failure to be deposed at most would have entitled the government to *a finding that those allegations were true* — not to an ultimate legal determination that the fine was not excessive.

the absence of Portillo's deposition and to attempt to craft a less drastic remedy in case such prejudice existed (which it did not).

Similarly unavailing is the government's attempt to distinguish *Fonseca* v. *Regan*, 734 F.2d 944 (2d Cir.), cert. denied, 469 U.S. 882 (1984), and *Harris* v. *City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995). The government argues (Br. in Opp. 11-13) that *Fonseca* and *Harris* differ from this case because the Second and Third Circuits concluded that the discovery sought was either irrelevant or not sufficiently related to the legal claims at issue, whereas the court below reached a contrary conclusion. We agree wholeheartedly with the government's descriptions of *Fonseca* and *Harris*, but not with its reading of the decision below. The sum total of the Ninth Circuit's statement on the topic was as follows: "The government was entitled to determine the underlying facts in order to make its case, and, contrary to the implication in appellants' briefs, the government never agreed that the case would be decided on the basis of the facts alleged in the forfeiture petition, or that discovery was unnecessary." Pet. App. 3a. In other words, the Ninth Circuit apparently believed both (1) that the government had a right to discovery regardless of whether any factual disputes existed between the parties, and (2) that the district court could sanction petitioners for failing to honor that alleged right even where the government failed to show how the discovery sought had any relation to the legal issues remaining in the case. That analysis — entitling the government to discovery (and to a dispositive *sanction* for failure to provide such discovery) without requiring a showing that the discovery related to any legal issue left in the case — plainly conflicts with both *Fonseca* and *Harris*, as well as with this Court's unbroken line of decisions on this issue.

Finally, the government erroneously dismisses (Br. in Opp. 13-14) our showing that the decision below conflicts with the demand of other circuits that district courts consider less drastic alternatives to dismissal prior to implementing that draconian sanction. See, *e.g.*, *Matter of MacMeekin*, 722 F.2d 32, 34-36 (3d Cir. 1983). True, the Ninth Circuit paid lip service to the need to consider less drastic alternatives. But it apparently understood that requirement to mean nothing more than what the government's brief asserts it means: that a party be given more than one

opportunity to comply with a discovery order before it can be punished for a failure to comply. See Br. in Opp. 13 ("The court below simply concluded, in the face of Portillo's willful disobedience of the district court's discovery orders, that no sanction short of a default judgment would be sufficient in this case."). But this Court's repeated admonitions against imposing the sanction of dismissal "'as a mere punishment'" for a party's refusal to comply with a discovery order (*Societe Internationale*, 357 U.S. at 210, quoting *Hammond Packing*, 212 U.S. at 350) make clear that both the government and the court below misapprehend the requirement to consider alternatives. Instead, that requirement mandates that the district court determine whether alternatives *to the unavailable discovery* — like, for example, resolving disputed facts in favor of the party demanding the discovery — would prevent the party seeking discovery from being prejudiced by the absence of the discovery. See, *e.g.*, *Pole No. 3172*, 852 F.2d at 642. It was the Ninth Circuit's failure to demand the consideration of such alternatives that conflicts with the decisions of this and other courts.

In short, neither the government nor the decision below identified a single disputed material factual issue that Mr. Portillo's deposition was needed to resolve. Under those circumstances, the dismissal of petitioners' claims as a sanction for Mr. Portillo's failure to be deposed violated Rule 37 and the Due Process Clause.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be summarily reversed, or at least vacated and remanded for reconsideration in light of the Court's decision in *Degen*.

Respectfully submitted.

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